BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MAZHAR SHAH	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,002,287
CESSNA AIRCRAFT COMPANY	)	
Respondent	)	
AND	)	
	)	
KEMPER INSURANCE	)	
Insurance Carrier	)	

ORDER

Respondent appeals from the preliminary hearing Order of Administrative Law Judge John D. Clark dated May 7, 2002. Claimant was awarded medical treatment, with the Court requiring respondent to furnish the names of three physicians for the selection of one by claimant for that treatment. The Court specifically found claimant's work for respondent aggravated his preexisting condition while doing overhead work and working in cramped spaces. Therefore, claimant's injury arose out of and in the course of his employment with respondent. The Court also held that respondent had notice of the injuries.

ISSUES

(1) Did claimant suffer accidental injury arising out of and in the course of his employment with respondent on the dates alleged?

(2) Did claimant provide notice to respondent in a timely fashion of this alleged accidental injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purposes of preliminary hearing, the Appeals Board (Board) finds that the Order of the Administrative Law Judge should be reversed.

Claimant began working for respondent on August 23, 2000. At that time, during the preemployment physical, it was noted that he had shoulder pain which claimant described as coming from sleeping wrong. Claimant was more comfortable sleeping on the floor than he was in the bed. Claimant described a two-year history of right shoulder, neck and upper back pain.

Claimant was transferred to crew chief Doyle Almack in November of 2000. Mr. Almack was soon advised by claimant that he had ongoing shoulder problems which prohibited him from working overhead. Mr. Almack said he regularly used other people to perform any overhead work. Claimant was placed in the nose compartment and doing cabin installation, neither of which involved overhead work.

In August of 2001, claimant went to Dr. Crook and was provided a restriction against any overhead work. This restriction was provided to respondent, and both Mr. Almack and Mr. McConnell testified that the restriction was adhered to. Claimant, however, denied respondent followed the restriction and testified that he was required, on many occasions, to violate that restriction.

Claimant testified that he was required to work outside his restriction on numerous occasions, performing overhead work. However, both Mr. Almack, claimant's crew chief, and Larry McConnell, the final line foreman, denied that claimant was required to work outside of his restriction. Both stated that claimant was very persistent in avoiding any type of overhead activities.

Claimant had been receiving treatment from his family physician, Diana R. Crook, M.D., since 1995. As early as September 28, 1998, claimant was experiencing pain in his right upper back, between the spine and the shoulder blades, with radiation to the neck and out towards the shoulder. Claimant had experienced no acute injury leading up to these symptoms. Claimant's shoulder and neck complaints continued throughout his entire employment with respondent.

Claimant worked for respondent through December 14, 2001, at which time he took FMLA leave after the birth of his daughter. Claimant was examined by Dr. Crook on December 20, 2001, shortly after leaving respondent. At that time, he told her that he was having pain in his neck and shoulder. He had undergone earlier trigger point injections, which provided no benefit. Likewise, chiropractic treatments provided no benefit. Claimant also advised Dr. Crook that he did range of motion exercises in the morning and was currently doing weight lifting four times a week. He felt the weight lifting might be the aggravating factor. Dr. Crook's medical note of December 20, 2001, also states that claimant works as a mechanic, but "doesn't feel this aggravates it."

Claimant underwent an MRI on January 24, 2002. As a result of that MRI, claimant was diagnosed with a herniated disc at C6-7.

On February 1, 2002, claimant advised respondent's in-house physician, Larry Wilkinson, M.D., that he felt his neck and shoulder pain and the herniated disc were related to his employment. February 2002 is the first time either Mr. Almack or Mr. McConnell were advised that claimant was alleging a work-related accident. Claimant's medical records were reviewed by Jeanne Barcelo, M.D. Dr. Barcelo opined claimant's herniated disc and neck and shoulder complaints predated his Cessna employment, with no evidence that Cessna had aggravated claimant's condition.

Claimant was referred to Pedro A. Murati, M.D., for an evaluation on March 27, 2002. Dr. Murati reviewed the medical records and found claimant to have neck and shoulder complaints which, according to claimant's history, occurred as a result of his overhead work and repetitive motion with long hours working for respondent. Dr. Murati's opinion and recommendations included that claimant not be at work and that his neck be decompressed as soon as possible. Other than reciting the history provided by claimant, Dr. Murati provided no opinion regarding the cause of claimant's ongoing symptoms.

In workers' compensation litigation, it is claimant's burden to prove his entitlement to benefits by a preponderance of the credible evidence. *See* K.S.A. 44-501 and K.S.A. 2001 Supp. 44-508(g).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has the responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

In order for a claimant to collect workers' compensation benefits under the Kansas Workers Compensation Act, he must suffer an accidental injury arising out of and in the course of his employment.

The phrase "out of employment" points to the cause or the origin of the accident and requires some causal connection between the accidental injury and the employment. An accidental injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the condition under which the work is required to be performed and the resulting injury. And injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of employment. Newman v. Bennett, 212 Kan. 562, 512 P.2d 497 (1973).

> The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred and means the injury happened while the workman was at work in his employer's service. Hormann v. New Hampshire Ins. Co., 236 Kan. 190, 689 P.2d 837 (1984).

In this matter, the evidence is contradictory between claimant and his supervisors. Claimant alleges multiple violations of his overhead work restriction, with both Mr. Almack and Mr. McConnell denying same. Claimant also testified that he suffered significant aggravations of his upper extremity problems while working for respondent, but the medical evidence in the record fails to support that. Claimant's ongoing treatment with his family physician, Dr. Crook, does not verify that claimant was suffering repetitive aggravations while at work. In fact, the medical report from Dr. Crook dated December 20, 2001, which was shortly after claimant left work on an FMLA leave, indicate that claimant felt his weight lifting activities, rather than his work for respondent, was the "aggravating factor."

Claimant also alleges that he talked to his supervisors regularly about the work-related nature of his symptoms. Both Mr. Almack and Mr. McConnell deny that claimant advised them of any work-related connection to these symptoms. They were, in fact, told that claimant's problems related to how he slept. Additionally, both deny claimant regularly worked overhead in violation of his restriction and both state that claimant was very specific about avoiding any type of overhead work. Claimant also advised Dr. Wilkinson at his August 7, 2001 examination that he woke up with the pain in his right shoulder. He advised Dr. Wilkinson that he had suffered no known injury.

The Board finds, based upon this record, claimant has failed to prove that the injuries suffered to his neck and right shoulder were caused or aggravated by his employment with respondent. Therefore, claimant has failed to prove that he suffered accidental injury arising out of and in the course of his employment with respondent.

K.S.A. 44-520 obligates that notice of an accident be provided to respondent within ten days after the date of accident. Claimant alleges he discussed his ongoing work-related problems with both his crew chief, Mr. Almack, and the final line foreman, Mr. McConnell. Both Mr. Almack and Mr. McConnell admit to knowing that claimant had upper extremity, shoulder and neck problems. However, the information provided to them indicated that claimant's problems preexisted his employment with respondent. Both Mr. Almack and Mr. McConnell testified the first notice they were provided that claimant was alleging a work-related accident was in February 2002, after claimant's examination with Dr. Wilkinson.

Claimant's last day worked with respondent was December 14, 2001. The ten-day limitation placed upon claimant by K.S.A. 44-520 would have run well before the February 1, 2002 notice to respondent of the alleged accident. The Board, therefore, finds claimant has failed to prove that he provided timely notice of accident as is required by K.S.A. 44-520.

For the above stated reasons, the Board finds that the Order of the Administrative Law Judge granting claimant medical treatment for the alleged accidental injuries should be reversed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge John D. Clark dated May 7, 2002, should be, and is hereby, reversed and claimant is denied an award against respondent having failed to prove that he suffered accidental injury arising out of and in the course of his employment and that he provided timely notice of that accident.

IT IS SO ORDERED.

Dated this ____ day of July 2002.

BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant
Vincent A. Burnett, Attorney for Respondent
John D. Clark, Administrative Law Judge
Philip S. Harness, Director